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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1100

AKSHUN MANUFACTURING COMPANY AND V & S ICE MACHINE COMPANY, INC.,

Petitioners,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,

Respondent,

AND

NORTH STAR ICE EQUIPMENT COMPANY; JAMES C. WOOD; LYLE BRANCHFLOWER; ALLEN J. TREUER; AND LOREN HOVLAND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition filed herein raises the same matters raised in the Petition for a Writ of Certiorari filed February 3, 1964, in this Court in No. 805. That Petition was denied on March 23, 1964.

JURISDICTION.

The jurisdictional requisites are adequately presented in the Petition.

STATEMENT OF THE CASE.

Petitioners are the patent owner. The patent has been declared valid but not infringed by Respondent, North Star Ice Equipment Company.

In March, 1957, Petitioner filed a patent infringement suit against a customer of North Star Ice Equipment Company in the state of Wisconsin.

In July, 1957, Respondent, North Star, filed a Declaratory Judgment action in the Chicago District Court against Petitioner, Akshun, and its licensee.

On April 25, 1961, the District Court held the patent valid and infringed.

On March 20, 1962, in Appeal No. 13443, the Court of Appeals for the Seventh Circuit reversed the District Court as to infringement, holding that the patent was not infringed, and further that the Petitioners were estopped to interpret their claims more broadly so as to include the North Star structure, a typical file wrapper estoppel matter.

In August, 1962, a Petition for a Writ of Certiorari was filed in this Court, No. 343, and Certiorari was denied, Nov. 5. 1962, 371 U. S. 889.

On May 17, 1963, Petitioners filed a Petition under Rule 60 (b) F. R. C. P. in the Court of Appeals for the Seventh Circuit asking alternatively:

(a) "to vacate judgment under Rule 60 (b)"

(b) "for leave to move before the District Court that the judgment be vacated under Rule 60(b)" or

(c) "to remand to the District Court the issues raised by this Petition."

On May 21, 1963, the Court of Appeals ordered North Star to Answer or respond to the Petition within 20 days. (Appendix A herein)

On June 10, 1963, North Star answered the Petition, fully and completely documenting all of the structures made by North Star and showing that the Petition was, in fact, baseless.

On July 30, 1963, the Court of Appeals dismissed the Petition on its merits and denied the alternative relief requested (Appendix B herein), saying:

> "The Court being fully advised of the issues raised by the Petition of Akshun Manufacturing Company, and the answer thereto filed by North Star Ice Equipment Company
>
> * * * * *
>
> IT IS FURTHER ORDERED, that the Petition filed by Akshun Manufacturing Company, that our judgment herein dated March 20, 1962, be vacated, and for alternative relief, be and the same is hereby denied."

In August, 1963, a request for rehearing on the Petition to Vacate Judgment under Rule 60 (b) was lodged with the Clerk of the Court of Appeals for the Seventh Circuit.

On November 5, 1963, the Court of Appeals denied the request for rehearing, stating therein as a further ground for denial, that the Petition was not timely.

On February 3, 1964, a Petition for a Writ of Certiorari to the Court was filed (No. 805) and denied by this Court on March 23, 1964, 376 U. S. 952.

On July 21, 1965, Petitioners filed an independent action in the Chicago District Court, No. 65 C 1219, making the

same allegations as were raised in the Petition under Rule 60 (b) in 1963.

On September 30, 1965, the District Court, pursuant to Motion and briefs filed in support, dismissed the suit on the ground that the Court of Appeals had denied Petitioners leave to proceed in the District Court on July 30, 1963.

On October 22, 1965, Notice of Appeal from the dismissal was filed, eventually becoming Appeal No. 15461 in the Court of Appeals for the Seventh Circuit.

On November 1, 1965, Petitioners filed a request before the Court of Appeals for the Seventh Circuit for leave to file the Complaint that had been dismissed by the District Court in No. 65 C 1219. This request was filed in original Appeal No. 13443.

On December 7, 1965, the Court of Appeals denied leave to file a Complaint in the District Court on the ground that Petitioners were seeking the same relief requested in 1963 and the motion only raised issues previously passed upon by the Court.

On February 2, 1966, pursuant to Motion by Respondent, North Star, Appeal No. 15461 was dismissed by the Court of Appeals on the ground that the issues in the appeal had already been decided by that Court.

Now Petitioners have filed the instant Petition for a Writ of Certiorari in No. 1100 seeking to review both appeals in the Court of Appeals for the Seventh Circuit, Nos. 13443 and 15461.

JUDGMENT AND ORDERS OF THE COURT BELOW.

Petitioners have placed the above heading in their Petition contending that they have been denied a hearing on the merits. Petitioners have had the full attention of the Court of Appeals on the merits of their Petition, and the Court found the alleged merits to be lacking.

Petitioners have omitted reference to the Order of the Court of Appeals for the Seventh Circuit dated May 21, 1963, ordering Respondent, North Star, to answer the Petition filed on May 17, 1963.

Petitioners have also omitted reference to the Order of the Court of Appeals dated July 30, 1963, denying the Petition and the alternative relief prayed for on the ground that the Petition lacked merit. Both of these Orders are appended hereto in the Appendix.

QUESTIONS PRESENTED.

All four questions are based on an erroneous premise that Petitioners have been denied a hearing on the merits of their charges. The Court of Appeals carefully considered the charges of fraud and misrepresentation in 1963.

On May 17, 1963, the same charges raised now were presented by Motion under F. R. C. P. Rule 60 (b) before the Court of Appeals for the Seventh Circuit. Respondent answered those charges on June 10, 1963, as ordered by the Court of Appeals for the Seventh Circuit on May 21, 1963. The answer was full and complete, showing conclusively there was no merit to Petitioners' charges. Physical ice removal blades complained of were placed before the Court of Appeals and fully documented.

On July 30, 1963, the Court of Appeals denied the Petition on its merits.

Petitioners have had the hearing to which Questions 1 and 2 are directed.

On November 5, 1963, the Court of Appeals for the Seventh Circuit denied a Petition for Rehearing of the July 30, 1963 Order. In this November Order, the Court of Appeals for the Seventh Circuit mentioned an additional reason for denying the original Petition under Rule 60 (b), that of timeliness. Petitioners herein choose to ignore the Order of July 30, 1963, denying the merits of their charges in favor of the November 5, 1963 Order.

The dismissal of the independent action brought in the District Court (Civil Action No. 65 C 1219) and the dismissal of the Appeal (No. 15461) was proper because the merits of the Complaint has been decided by the Court of Appeals by its July 30, 1963 Order.

The Order of December 7, 1965, by the Court of Appeals in No. 13443, denying leave to these Petitioners to file the independent action, was also proper. The same leave was requested in the May 17, 1963 Petition before the Court of Appeals and denied by its Order of July 30, 1963.

These Petitioners raise no new issue nor present any new evidence over that presented to the Court of Appeals for the Seventh Circuit in the Petition filed May 17, 1963, and in the Petition for a Writ of Certiorari in No. 805 during the October Term, 1963.

The Court of Appeals examined the charges made and denied the Petition on its lack of merit.

Petitioners' charges have been thoroughly reviewed by the Court of Appeals for the Seventh Circuit. Petitioners have had their day in Court and their charges have been found baseless. Petitioners have used the judicial processes to seek a second review of the same charges before the Court of Appeals. They were unsuccessful. Now, Petitioners seek to use judicial processes to seek a second

review before this Court. They should be unsuccessful and Certiorari denied.

There should be an end to litigation.

CONCLUSION.

The Court of Appeals for the Seventh Circuit has carefully considered the charges of fraud and misrepresentation brought by these Petitioners. The Court of Appeals has denied the charges on their lack of merit. The Supreme Court has previously denied a Petition for a Writ of Certiorari. There is no substance to the charges and there is no reason which should compel this Court now to grant a Writ of Certiorari. This Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 29, 1966.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

Tuesday, May 21, 1963.

Before
Hon. F. Ryan Duffy, Circuit Judge.

NORTH STAR ICE EQUIPMENT COMPANY,
Plaintiff-Appellant (Respondent),
No. 13443 *vs.*
AKSHUN MANUFACTURING COMPANY, ET AL.,
Defendants-Appellees (Petitioners).

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that North Star Ice Equipment Company file an answer or otherwise reply to the petition of Akshun Manufacturing Company and V&S Machine Company, Inc to Vacate Judgment Under Rule 60(b), Or For Leave To Move Before The District Court That The Judgment Be Vacated Under Rule 60(b), Or To Remand To The District Court The Issues Raised By This Petition, filed in this Court on May 17, 1963, within twenty (20) days from this date.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

July 30, 1963.

Before

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Frederick O. Mercer, District Judge.

NORTH STAR ICE EQUIPMENT COMPANY,
Plaintiff-Appellant,
No. 13443 *vs.*
AKSHUN MANUFACTURING COMPANY, ET AL.,
Defendant-Appellees.

On March 20, 1962, this Court rendered a decision and judgment, affirming in part and reversing in part, the judgment of the District Court herein. We reversed that part of the District Court judgment which held that claims 1 through 8 of the patent in suit were infringed by North Star knives and tools. We also reversed the holding of the District Court that plaintiff came into Court with unclean hands.

Approximately fourteen months later, to-wit, on May 17, 1963, defendant Akshun Manufacturing Company filed with the Clerk of this Court, a petition to vacate our final judgment, or for leave to move before the District Court that the judgment be vacated under Rule 60(b), or to re-

mand to the District Court the issues raised by the petition. On June 10, 1963, plaintiff North Star Ice Equipment Company filed its answer to the petition, denying the pertinent allegations of the petition.

On June 13, 1963, Akshun Manufacturing Company filed what it designated as an "Emergency Motion", asking leave to file an answer to North Star's answer.

The Court being fully advised of the issues raised by the petition of Akshun Manufacturing Company, and the answer thereto filed by North Star Ice Equipment Company

IT IS ORDERED, the petition of Akshun Manufacturing Company for leave to file an answer to the answer filed by North Star Ice Equipment Company be and the same is hereby denied.

IT IS FURTHER ORDERED, that the petition filed by Akshun Manufacturing Company, that our judgment herein dated March 20, 1962 be vacated, and for alternative relief, be and the same is hereby denied.